



July 16, 2001

Mr. Anthony J. Nelson
Bickerstaff, Health, Smiley, Pollan, Kever & McDaniel, L.L.P.
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

OR2001-3083

Dear Mr. Nelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149442.

Kimble County (the "county"), which you represent, received a request for eight categories of information concerning the county's participation in the West Texas Rural Counties Association ("WTRCA"), an insurance pool. Specifically, the requestor seeks:

- (1) Copies of all financial statements and related documents in the possession of the [county] Government covering the period from January 1, 1999 to the present. This request includes, but is not limited to, documents addressing your entity's: (a) revenues and expenditures; (b) assets and debts; (c) budget information; and (d) fiscal statements (audited and unaudited);
- (2) Copies of all contracts, agreements and understandings between [the county] Government and the [WTRCA];
- (3) Copies of all documents and communications, written and electronic, between the [county] Government and the [WTRCA] concerning the payment of the creditors of the [WTRCA] in the period of time between October 1, 1998 and the date of your response to this request;

(4) Copies of all communications and documents, written and electronic, in the possession of the [county] Government which refer to, mention or relate to the [WTRCA];

(5) Copies of all documents and communications, written and electronic, in the possession of the [county] Government which refer to, mention or relate to [Eckerd Health Services ("EHS")] in the period of time between April 1, 1996 to the date of your response to this request;

(6) Copies of the charter, charter amendments, by-laws, by-law amendments, minutes and resolutions of the [WTRCA];

(7) Copies of all reports, correspondence or communications between the members of [WTRCA] and the [WTRCA], in the period of time between April 1, 1996 to the date of your response to this request; and

(8) Copies of the Interlocal Participation Agreement (Employee Benefit Pool) and all amendments thereto between the [WTRCA] and [the county].

You claim that the requested information is excepted from disclosure under sections 552.102, 552.103, and 552.107 of the Government Code. In addition, you claim that some of the requested information is protected from disclosure under sections 803.402 and 815.503 of the Government Code, section 159.002 of the Occupations Code, and section 773.091 of the Health and Safety Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the information submitted to this office is expressly made public under section 552.022 of the Government Code. Section 552.022 of the Government Code provides for several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section provides:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108;

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

....

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

....

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (5), (17). Our office has previously concluded that sections 552.103 and 552.107 are discretionary exceptions. *See* Open Records Decision Nos. 630 (1994) (section 552.107 is a discretionary exception), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential). We do not believe that these exceptions "expressly [make] information confidential under other law." Gov't Code § 552.022. Therefore, the information subject to section 552.022 may not be withheld under either of these claimed exceptions. Furthermore, the information is not confidential under the statutes the county raised, and thus must be released to the requestor. We have marked those documents that the county must release to the requestor under section 552.022 of the Government Code.

We now address your section 552.103 claim for the remainder of the submitted information. Section 552.103, the "litigation exception," provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The county has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The county must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

We note that in Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it receives a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor this office will consider in determining from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated.

You state that concurrent with the request for information, the county was served a Notice of Claim and Demand for Payment pursuant to section 89.004(a) of the Local Government Code and section 101.101(a) of the Texas Civil Practice and Remedies Code, asserting claims that the county is jointly and severally liable for breach of contract, breach of

¹ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

fiduciary duties, and fraud and misrepresentation in connection with the failure to pay the balance due on an installment note. The claim letter further states that EHS "will consider taking all actions allowed by law, including, but not limited to filing a lawsuit" After reviewing your argument and all of the submitted information, we conclude that litigation is reasonably anticipated in this instance. We also find that the submitted information is related to the anticipated litigation for the purposes of section 552.103 of the Government Code. Consequently, with the exception of the following, the county may withhold the remaining requested information under section 552.103 of the Government Code.²

We note that the responsive information contains minutes from the Commissioner's Court session meetings. Section 551.022 of the Government Code expressly provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." These are public records pursuant to the Open Meetings Act. Gov't Code § 551.022. Therefore, the minutes of the Commissioner's Court session meetings may not be withheld from disclosure pursuant to section 552.103 and must be released to the requestor.

In addition, the submitted records include information seen by the opposing party. Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the county must release those documents enumerated under section 552.022 of the Government Code. Minutes from the Commissioner's Court session meetings are public and must be released to the requestor in their entirety. To the extent the responsive information has not been obtained by the opposing party, the county may withhold the remainder of the information under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

² Because section 552.103 is dispositive, we do not address your other claimed exceptions.

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

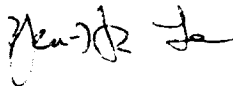
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DBF/seg

Ref.: ID# 149442

Enc.: Marked documents

cc: Mr. Peter Franklin, III
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